No. 11801

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant.

vs.

MINA BICKFORD,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Montana

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

JOHN B. TANSIL,

Attorney of the United States in and for the District of Montana,

Billings, Montana,

HARLOW PEASE,

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Butte, Montana,

Attorneys for Appellant.

HARRISON J. FREEBOURN,

Butte, Montana,

Attorney for Appellee. [1*]

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* Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, District of Montana, Butte Division

No. 3563

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MINA BICKFORD,

Defendant.

[Title of District Court and Cause.]

INDICTMENT
(18 U.S.C. 231)

The Grand Jury Charges:

The defendant Mina Bickford, on or about October 22, 1945, at Butte, in the District of Montana and within the jurisdiction of this court, in the District Court of the United States for the District of Montana then and there engaged in the trial of a criminal cause entitled "United States of America vs. Charles Howard Downey" wherein said Downey was charged with the crime of violation of the White Slave Traffic Act, after having taken an oath as a witness before the said District Court which was administered by the Clerk of said Court that she would testify truly, did wilfully, corruptly, falsely and feloniously and contrary to said oath testify to certain matters which were material to the issues of the cause then on trial, to-wit:

Said defendant testified that a certain house situated at No. 14 South Whoming Street, in the City

of Butte, Montana, was in the month of December, 1944, a rooming house; that in said house no other business except that of a rooming house was carried on in the month of December, 1944; that the said house was not in the month of December, 1944, a house of prostitution; that said house was not a house of prostitution at the time defendant was testifying, and never was such; that she, said defendant, did not see the said Charles Howard Downey and one Pauling Gleason Young at any time in the month of December, [3] 1944; that she, said defendant, did not state to one Vincent Garvey, a Special Agent of the Federal Bureau of Investigation, in June, 1945, that she recognized said Pauline Gleason Young as the girl who came to Butte from Seattle and that as a fact she, said defendant, had not in June, 1945, recognized said Pauline Gleason Young as a girl brought to said house at 14 South Wyoming Street, Butte, Montana, by said Charles Howard Downey for the purpose of going to work as a prostitute. Said testimony was false and known by said defendant to be false, and said defendant did not believe the same to be true. In truth and in fact the said house at 14 South Wyoming Street, Butte, Montana, was a house of prostitution in the month of December, 1944, and for years prior thereto, and was such thereafter up to and at the time the defendant was testifying, and was well known by the defendant to be such; the said defendant did see the said Charles Howard Downey and the said Pauline Gleason Young in the

month of December, 1944, at which time said Downey proposed to introduce said Pauline Gleason Young into said house of prostitution for the purpose of engaging in prostitution; that she, said defendant, did state to Vincent Garvey, above mentioned, in June, 1945, that she recognized said Pauling Gleason as the girl who came to Butte from Seattle, and as the girl who was brought to said house at 14 South Wyoming Street, Butte, Montana, by said Downey for the purpose of going to work as a prostitute. Said matters were material to the issues then being tried in said cause in that the said Charles Howard Downey was charged by indictment in said court with having unlawfully transported said Pauling Gleason Young in interstate commerce for the purpose of prostitution on or about the 5th day of December, 1944.

A true bill:

T. LOYE ASHTON,
Foreman.

JOHN B. TANSIL,
United States Attorney.

Filed in open Court this 18th day of February, A.D. 1947.

/s/ H. H. WALKER,
Clerk. [4]

[Title of District Court and Cause.]

Minute Entry, November 3, 1947

MOTION OF DEFENDANT TO DISMISS THE INDICTMENT HEREIN

This cause was duly called for trial this day, Messrs. Harlow Pease and Emmett C. Anglund, Assistant United States Attorneys, being present and appearing for plaintiff, and Mr. H. J. Freebourn and the defendant being present.

Thereupon, Mr. Freebourn, attorney for defendant, moved to dismiss the indictment herein for the reason the indictment does not state a public offense, and after statement by Mr. Freebourn and Mr. Pease, the said motion was submitted to the Court, and after due consideration was by the Court granted, the indictment is ordered dismissed and defendant's bond ordered exonerated. Counsel for plaintiff excepted to ruling of Court.

Entered in open Court at Butte, Montana, November 3, 1947.

H. H. WALKER,
Clerk. [5]

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Be It Remembered, that this cause came on regularly for trial before the Honorable R. Lewis Brown, Judge of the District Court of the United States, District of Montana, Butte Division, on the 3rd day of November, 1947, Messrs. Harlow Pease and Emmett C. Angland, Assistant United States Attorneys for the District of Montana, appearing as attorneys for the plaintiff, and Mr. Harrison J. Freebourn, Butte, Montana, appearing as attorney for the defendant.

Thereupon, the following proceedings were had:

The Court: Number 3563, United States vs. Mina Bickford. Are the parties ready?

Mr. Pease: The government is ready.

Mr. Freebourn: The defendant is ready.

The Court: Hand me the file, will you please? Well, as you know, gentlemen, last week in doing some work on this case [7] preparatory to trial, I had a doubt as to whether or not the case could be tried because of the allegations, or as I view them, the lack of allegations, in the indictment. I called that to the attention of both you counsel, and what have you to say? Do you think the indictment states a public offense?

Mr. Freebourn: I was going to interpose a motion when the evidence was started, and it may save drawing a jury, I don't know, depending upon how the Court looks at it. I was going to interpose an objection to the introduction of evidence and a

motion that the indictment be dismissed upon the ground and for the reason that the indictment does not state a public offense. I am certain under the statute it is absolutely necessary that the officer who administered the oath had that authority; it is too plain to me to be otherwise. In the cases cited, they did allege that, but this indictment does not allege that at all.

Mr. Pease: If the Court please, I would like to have particular thought given to the language of the statute, 558, upon which the language—under the language of which the attack is made upon the indictment. It is the theory that it was, and is, an essential part of the indictment that it should set forth not merely the facts, stating that the oath was administered before the United States District Court, not only stating that it was administered in a trial and proceeding in the United States District Court, not only that it was administered [8] by the Clerk of said Court, all of which are alleged in the indictment, but in addition to alleging the facts that this was the Court and this was the Clerk, that the Clerk did have authority to administer the oath, which is, of course, by statute a necessary conclusion falling from the statement of such facts. Now, that is based upon the statute, reading Section 558 of Title 18, "In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to ad-

minister the same." Now, it seems to me, your Honor, that the criticism of the indictment is based upon an assumption that the statute reads "averring such court and person to have competent authority to administer the same." It seems to me that that would be the assumption, because otherwise the theory would not have apparent validity, not averring such court or person to have competent authority to administer the same. Now, we may deal, and the courts have dealt, with a variety of courts and a variety of officers in perjury cases. A United States Commissioner has a Commissioner's Court, which is of inferior and limited jurisdiction, and yet perjury may be committed in a Commissioner's Court, and a false swearing, perhaps, may happen in a Commissioner's Court which would not amount to perjury for the reason that it would be committed in [9] a proceeding of which the Commissioner did not have jurisdiction, or in a proceeding which, by reason of some irregularity, the requisite authority did not exist. Now, I point this out, your Honor, that if it is necessary for the indictment not only to allege that the oath was administered by the Clerk of the United States District Court, but also the conclusion that such Clerk had such authority, then it is also necessary for us to plead that the oath was administered in the United States District Court, and that this Court had authority to try the case of United States vs. Charles Howard Downey for violation of the White Slave Traffic Act. On the other hand, taking the statute as it reads, with special emphasis upon the

disjunctive, or instead of the possibly assumed conjunctive, is it not a compliance with Section 558 that the facts are fully stated showing that this Court was engaged in a trial of a violation of a federal statute in which a federal question was involved, and of which the Court had jurisdiction? In other words, doesn't this mean that if the facts stated in the indictment show either that the Court or officer had authority in the premises, is that not a compliance with Section 558? That is the way it appears to me.

It further may be suggested herein I believe no case can be found holding bad an indictment for perjury where the alleged perjury is said to have been committed before the United States District Court, and the oath administered by the [10] Clerk of said Court, for failure to say that the Clerk under such circumstances, and under the facts alleged in this indictment, had authority to administer the oath. Authorities do exist where the courts have overruled attacks upon indictments in circumstances where, through an abundance of caution, or otherwise, there was an allegation which the defendant claimed was defective, and the court said was sufficient. There have been reversals of one or more in cases involving inferior tribunals not of plenary jurisdiction such as the United States District Court. I say plenary and not general because I believe that when the federal question arises, like the trial of a White Slave Traffic Act case, as existed here, once that is established, this Court has plenary jurisdiction. So, I say I believe there is one case sustaining an attack upon an indictment

where the oath was administered before an inferior court. That case was also reversed on two other grounds, thereby weakening the case to such extent, or the authority of it.

The Court: What do you say about the decision of the Circuit Court of Appeals of the Fifth Circuit in 24 Federal 2nd?

Mr. Pease: The title of the case, your Honor?

The Court: Hilliard against United States. How do you answer the reasoning of the Circuit Court of Appeals there?

Mr. Pease: If it is the case which I have in mind, I believe the Court goes beyond the necessary conclusion to be made. [11]

The Court: The Circuit Court of Appeals there says it is an essential allegation.

Mr. Pease: I answer that, of course, by saying that no conclusion, especially under the present rules of criminal pleading, no conclusion is an essential allegation; that all that needs be alleged are facts, and we have alleged all the facts, every fact it is possible to allege. We haven't gone beyond that to allege the legal conclusion which the Court must take judicial notice of, namely, that the Clerk has authority to administer oaths in the trials before this Court.

The Court: The Circuit Court of Appeals didn't say that was a legal conclusion there.

Mr. Pease: The case, I believe was decided—that may or may not be of importance—before the enactment of the new rules, but they simply didn't discuss the question, as I remember the language of the decision.

The Court: They discussed it to the extent they said it was an essential allegation.

Mr. Pease: They didn't discuss any distinction between allegations of facts and allegations of a legal conclusion, so I don't think that my position is any worse on that case than that of the defendant. The particular point which I am presenting here doesn't seem to have been specifically answered by the opinion in that case.

The Court: That may be true. Your point is it's conjunctive [12] instead of disjunctive. But there is no allegation in the indictment that either the Court or the officer had authority to administer the oath.

Mr. Pease: That is right, and if that is taken to mean the indictment is bad unless it alleges the legal conclusion which flows from the facts which the indictment does contain, I have nothing further to say.

The Court: If by Act of Congress—if Congress says it is necessary to plead a legal conclusion, is the pleading good without pleading the legal conclusion that Congress says must be pleaded?

Mr. Pease: I don't know whether this is a correct statement, but it seems to me we are in a vicious circle. I am assuming Congress has never enacted that it is necessary to plead anything except facts, not evidentiary facts, but ultimate facts, and I just can't see there is. It must be admitted that there is no reason why there should be an exception to the general rule, either in a criminal or civil pleading, that that which is a matter of judicial notice

by the Court, such as laws, constitutions and so forth, need not be pleaded. I don't know why it should have been different in this case, and if it be said Congress so enacted, that is merely a matter of interpretation. On the face of it, it may so appear, but in the absence of any reason, why should it not be interpreted to mean by alleging facts from which such authority is [13] necessarily concluded. That is my position as nearly as I can express it, your Honor.

The Court: Well, the statute, Section 558 of Title 18, provides that in any presentment or indictment prosecuted against any person for perjury it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court and before whom the oath was taken, averring —which is synonymous as I view it with alleging— such court or person to have competent authority to administer the same. There is no such averment or allegation in this indictment. The matter was before our Circuit Court of Appeals in Barnard against United States, 162 Federal at 618. The allegation in the indictment there was that the officer administering the oath had authority to administer an—A-N—oath. Appeal was taken to the Circuit Court of Appeals on the ground that that was not sufficient compliance with the statute, and the Court held that it was. It was before our Circuit Court of Appeals again in United States against Pawley, 47 Federal Second at 1024. The Supreme Court there held the necessary averment or allegation was in the indictment, or rather the

Circuit Court of Appeals. In neither one of those cases did the Circuit Court of Appeals intimate that such averment or such allegation was not a necessary allegation or necessary averment in the indictment. They charged the offense in Hilliard against U. S., 24 Federal [14] Second, 99. The Circuit Court of Appeals for the Fifth Circuit said, "In charging perjury, it is sufficient, but it is also necessary, to set forth the substance of the offense and to show before whom the oath was taken, with the averment that the officer taking it had authority to administer it, together with the proper averment to falsity the matter whereon the perjury is assigned." It seems to me that if there were any question about the language, the Circuit Court of Appeals of the Fifth Circuit settles it, and in view of the fact that the question, as I have said, has been before our Circuit Court of Appeals twice, and in no decision before them have they intimated that the statute did not mean what it said, or that an indictment was good that failed to include the necessary averment. The only cases I have found in which an indictment has been sustained in anywise touching the question without having such an averment in it are cases in which one was charged with subornation of perjury, and, of course, reading Section 559, Title 18 in connection with Section 558, 559 setting forth the essentials necessary to state a public offense for subornation of perjury, it is apparent why such decision would be made, because there is no such provision at all in Section 559 and no requirement that such averment be made in the

indictment. That being the law, as I view it, and no authority to the contrary having been cited to me, it seems to me that the indictment does not state a public [15] offense, and that I have no alternative except to dismiss the action for that reason and exonerate the defendant's bail.

Mr. Pease: May the record show an exception, your Honor?

The Court: The government will be granted an exception to the ruling of the Court. [16]

I, John J. Parker, Official Court Reporter in the District Court of the United States, District of Montana, Butte Division, do hereby certify that the foregoing annexed transcript is a true and correct record of the proceedings had in Criminal Action No. 3563, United States of America, Plaintiff, vs. Mina Bickford, Defendant, before the Honorable R. Lewis Brown in the Federal Building at Butte, Montana, on November 3, 1947.

/s/ JOHN J. PARKER,
Official Court Reporter.

[Endorsed]: Filed Nov. 28, 1947. H. H. Walker, Clerk. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Offense: Perjury, alleged to have been committed October 22, 1945, at Butte, Montana, in the United States District Court for the District of Montana, Butte Division, by the defendant then sworn and testifying as a witness in the cause of United States v. Charles Howard Downey on an indictment for violation of the White Slave Traffic Act; in violation of Title 18 United States Code, Sec. 231. Indictment contains one count.

Concise statement of judgment or order: That certain order and judgment made on November 3, 1947, granting defendant's motion to dismiss, and ordering dismissed, the indictment in this cause.

The above-named appellant, United States of America, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the above-mentioned order and judgment.

Dated November 26, 1947.

JOHN B. TANSIL,
U. S. District Attorney for Montana.
HARLOW PEASE,
Assistant United States Attorney,
EMMETT C. ANGLAND,
Assistant United States Attorney,
Attorneys for Appellant.

[Endorsed]: Filed Nov. 26, 1947. H. H. Walker, Clerk. [19]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

The plaintiff hereby designates the portions of the record in the United States District Court to be contained in the record on appeal as follows:

The indictment.

The minutes of said Court of date November 3, 1947.

The transcript of the proceedings had by the Court and counsel on November 3, 1947.

The judgment of the Court appealed from.

The notice of appeal.

This designation.

Appellant's statement of points on appeal.

JOHN B. TANSIL,
U. S. District Attorney for Montana.
HARLOW PEASE,
Assistant United States Attorney,
EMMETT C. ANGLAND,
Assistant United States Attorney,
Attorneys for Appellant.

Service of the foregoing is hereby admitted this 28th day of November, 1947.

HARRISON J. FREEBOURN,
Attorney for Defendant and Respondent.

[Endorsed]: Filed Dec. 1, 1947. H. H. Walker, Clerk. [21]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The Court erred in granting defendant's motion to dismiss the indictment.

JOHN B. TANSIL,
U. S. District Attorney for Montana,

HARLOW PEASE,
Assistant United States Attorney,

EMMETT C. ANGLAND,
Assistant United States Attorney,

Attorneys for Appellant.

Service of the foregoing is hereby admitted this 28th day of November, 1947.

HARRISON J. FREEBOURN,
Attorney for Defendant and Respondent.

[Endorsed]: Filed Dec. 1, 1947. H. H. Walker, Clerk. [23]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
District of Montana—ss.

I, H. H. Walker, Clerk of the District Court of the United States in and for the District of Montana, do hereby certify to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume consisting of 24 pages, numbered consecutively from 1 to 24, inclusive, is a full, true and correct transcript of all matter designated by the parties and required by rule as the Record on Appeal in Case No. 3563, United States of America, Plaintiff, vs. Mina Bickford, Defendant, as appears from the original records and files of said District Court in my custody as such Clerk.

I further certify that the costs of said Transcript amount to the sum of Five and 20/100 Dollars ($5.20), and have been made a charge against the appellant.

Witness my hand and the seal of said District Court at Butte, Montana, this 16th day of December, A.D. 1947.

[Seal] H. H. WALKER, Clerk.
By /s/ D. F. HOLLAND,
Deputy Clerk. [24]

[Endorsed]: No. 11801. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant. vs. Mina Bickford, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Montana.

Filed December 19, 1947.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.